

“Article One: Strengthening Congressional Oversight Capacity”

Hearing Before the House Select Committee
on the Modernization of Congress

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Testimony of Josh Chafetz
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Chairman Kilmer, Vice Chairman Timmons, and Distinguished Members of the Committee:

Thank you for the opportunity to testify today regarding the vitally important topic of congressional oversight. My name is Josh Chafetz, and I am a Professor of Law at Georgetown University Law Center and an Affiliated Faculty Member of both the Government Department and the McCourt School of Public Policy at Georgetown. My research and teaching focus on legislative procedure, the separation of powers, and the constitutional structuring of American national politics. In 2019-2020, I served on the American Political Science Association’s Presidential Task Force on Congressional Reform, which produced a report for this Committee.¹

CONGRESS’S POWER—AND DUTY—TO CONDUCT VIGOROUS OVERSIGHT

Although oversight is not explicitly mentioned in the text of the Constitution, its existence is a necessary structural inference from the powers that are enumerated. Congress is given the power to legislate on all matters within the purview of the federal government,² including matters dealing with the structuring and operations of other parts of the federal government itself;³ to control the raising and disbursing of federal moneys;⁴ to impeach and try impeachments;⁵ and to propose constitutional amendments.⁶ (The Senate is also given the power to confirm principal officers and ratify treaties.⁷) This is a *very* expansive remit.⁸

¹ See AM. POL. SCI. ASS’N TASK FORCE ON CONGRESSIONAL REFORM, TASK FORCE REPORT 8-16 (2019), available at <https://www.apsanet.org/Portals/54/APSA%20RPCI%20Congressional%20Reform%20Report.pdf?ver=2020-01-09-094944-627> [hereinafter APSA REPORT].

² U.S. CONST. art. I, § 8; *id.* art. IV, § 3, cl. 2; *id.* amend. XIII, § 2; *id.* amend. XIV, § 5; *id.* amend. XV, § 2; amend. XIX, cl. 2; *id.* amend. XXIII, § 2; *id.* amend. XXIV, § 2; *id.* amend. XXVI, § 2.

³ *Id.* art. I, § 8, cl. 18; *id.* art. II, § 1, cl. 4; *id.* § 2, cl. 2; *id.* art. III, § 1; *id.* § 2, cl. 2; *id.* amend. XX, §§ 3-4; *id.* amend. XXV, § 4.

⁴ *Id.* art. I, § 8, cl. 1-2; *id.* § 9, cl. 7.

⁵ *Id.* art. I, § 2, cl. 5; *id.* § 3, cl. 6-7; *id.* art. II, § 4.

⁶ *Id.* art. V.

⁷ *Id.* art. II, § 2, cl. 2.

⁸ See Josh Chafetz, *Nixon/Trump: Strategies of Judicial Aggrandizement*, 110 GEO. L.J. (forthcoming 2021) (manuscript at 18 n.113), available at <https://ssrn.com/abstract=3788366> [hereinafter Chafetz, *Nixon/Trump*] (“Even if one accepts that any given exercise of the congressional investigatory power must be justified with respect to some explicitly enumerated congressional power, however, it does not follow that there is any matter beyond Congress’s capacity to investigate.... [E]ven an investigation for a (currently) unconstitutional purpose could be

Each of these vital constitutional powers requires access to information if it is to be exercised effectively in the public interest. As Senator Fulbright put it, “The power to investigate is one of the most important attributes of the Congress. It is perhaps also the most necessary of all the powers underlying the legislative function.”⁹ As the great legal scholar (and later member of the Federal Trade Commission and member and chair of the Securities and Exchange Commission) James Landis elaborated,

[K]nowledge is not an *a priori* endowment of the legislator. His duty is to acquire it, partly for the purposes of further legislation, partly to satisfy his mind as to the adequacy of existing laws. Yet the ultimate basis for the duty is the broader presupposition of representative government that the legislator is responsible to his electorate for his actions. Responsibility means judgment, and judgment, if the word implies its intelligent exercise, requires knowledge.¹⁰

Or, more succinctly, “To deny Congress power to acquaint itself with facts is equivalent to requiring it to prescribe remedies in darkness.”¹¹ No sensible constitutional order would require its most representative institution, an institution tasked with carrying out the vital tasks listed above, to blind itself.¹²

Unsurprisingly, then, broad oversight powers have been understood to inhere in the congressional chambers from the earliest days of the Republic. In 1792, the House conducted the first major congressional investigation, inquiring into the defeat of an army force under the command of General Arthur St. Clair by a confederacy of Native American tribes at the Battle of the Wabash.¹³ That investigation, conducted by a special committee, included taking testimony from St. Clair himself and Secretary of War Henry Knox, as well as examining St. Clair’s personal papers and papers from the War Department and the Treasury Department (personally delivered by Treasury Secretary Alexander Hamilton). The committee’s investigation spurred Congress to take remedial action, removing authority for procuring army supplies from the War Department and locating it in the Treasury Department.¹⁴ Importantly, the House conducted the

justified as an investigation that might potentially lead to a constitutional amendment, making that (formerly) unconstitutional purpose constitutional.”)

⁹ J.W. Fulbright, *Congressional Investigations: Significance for the Legislative Process*, 18 U. CHI. L. REV. 440, 441 (1951).

¹⁰ James M. Landis, *Constitutional Limitations on the Congressional Power of Investigation*, 40 HARV. L. REV. 153, 205 (1926).

¹¹ *Id.* at 209.

¹² See also, e.g., JOSH CHAFETZ, CONGRESS’S CONSTITUTION: LEGISLATIVE AUTHORITY AND THE SEPARATION OF POWERS 152-98 (2017) [hereinafter CHAFETZ, CONGRESS’S CONSTITUTION]; Josh Chafetz, *Congressional Overspeech*, 89 FORDHAM L. REV. 529 (2020) [hereinafter Chafetz, *Overspeech*]; Carl Levin & Elise J. Bean, *Defining Congressional Oversight and Measuring Its Effectiveness*, 64 WAYNE L. REV. 1 (2018).

¹³ For accounts of the St. Clair investigation and the events giving rise to it, see ERNEST J. EBERLING, CONGRESSIONAL INVESTIGATIONS: A STUDY OF THE ORIGIN AND DEVELOPMENT OF THE POWER OF CONGRESS TO INVESTIGATE AND PUNISH FOR CONTEMPT 36-37 (1928); DOUGLAS L. KRINER & ERIC SCHICKLER, INVESTIGATING THE PRESIDENT: CONGRESSIONAL CHECKS ON PRESIDENTIAL POWER 9-12 (2016); George C. Chalou, *St. Clair’s Defeat, 1792*, in 1 CONGRESS INVESTIGATES: A DOCUMENTED HISTORY, 1792-1974, at 3 (Arthur M. Schlesinger Jr. & Roger Bruns eds., 1975); Chafetz, *Overspeech*, *supra* note 12, at 537-38.

¹⁴ An Act Making Alterations in the Treasury and War Departments, ch. 37, § 2, 1 Stat. 279, 280 (1792). See Chalou, *supra* note 13, at 13 (characterizing this statute as “a slap at Knox”). See also KRINER & SCHICKLER,

St. Clair investigation after *rejecting* a proposal that it instead “request[]” that President Washington initiate an investigation into the defeat.¹⁵ As early as the Second Congress, then, it was vitally important to members of Congress that they, and not executive branch officials, be the ones who oversaw the executive branch and remedied any defects they found therein.

In conducting the St. Clair investigation, the House was calling on a long tradition of oversight by Anglo-American legislatures.¹⁶ By the middle of the eighteenth century, it was common to refer to the British House of Commons as “the grand inquest of the nation,”¹⁷ that is, the body tasked with inquiring into national affairs and righting any wrongs it might find. As William Pitt the Elder put it on the House floor in 1741, “We are called the Grand Inquest of the Nation, and as such it is our Duty to inquire into every Step of publick Management, either Abroad or at Home, in order to see that nothing has been done amiss.”¹⁸

Early American constitutional thinkers picked up on this “grand inquest” language and applied it to Congress. Virginia delegate George Mason argued at the Constitutional Convention that Congress should be required to meet once a year because “the Legislature, besides *legislative*, is to have *inquisitorial* powers, which can not safely be long kept in a State of suspension.”¹⁹ In his famous 1790-1791 “Lectures on Law,” Supreme Court Justice James Wilson (who had also played a major role as a Pennsylvania delegate to the Constitutional Convention) echoed: “The house of representatives, for instance, form the grand inquest of the state. They will diligently inquire into grievances, arising both from men and things.”²⁰ And in the House itself in 1794, Massachusetts Federalist Fisher Ames, who had been a delegate to the Massachusetts ratifying convention, referred to “the character of this House as the grand inquest of the Nation, as those who are not only to impeach those who perpetrate offence, but to watch and give the alarm for the prevention of such attempts.”²¹

Although oversight was understood to be an important congressional power from the earliest days of the Republic, as both early constitutional discourse and the St. Clair investigation make clear, it gained prominence and importance with the rapid growth of the administrative state beginning in the late nineteenth century. Indeed, it was this era that gave rise to the most important Supreme Court decision on the scope of the congressional oversight power, *McGrain*

supra note 13, at 12 (noting that this investigation as a whole “embarrassed and politically damaged the Federalists” and emboldened the Jeffersonian faction in nascent partisan competition).

¹⁵ H.R. JOUR., 2d. Cong., 1st Sess. 551-52 (Mar. 27, 1792).

¹⁶ See Josh Chafetz, “*In the Time of a Woman, Which Sex Was Not Capable of Mature Deliberation*”: *Late Tudor Parliamentary Relations and Their Early Stuart Discontents*, 25 YALE J.L. & HUMAN. 181, 188-91, 195-99 (2013) (noting the House of Commons’ use of committees to take evidence and decide contested elections in the mid-sixteenth and early-seventeenth centuries); CHAFETZ, CONGRESS’S CONSTITUTION, *supra* note 12, at 48-49, 157-63, 268 (noting the Commons’ use of their investigatory power as a tool in their clashes with the Stuart monarchs in the seventeenth century).

¹⁷ See Chafetz, *Overspeech*, *supra* note 12, at 538-41 (tracing the development of the “grand inquest” formulation).

¹⁸ 13 THE HISTORY AND PROCEEDINGS OF THE HOUSE OF COMMONS 172 (London, Richard Chandler 1743).

¹⁹ 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 199 (Max Farrand ed., rev. ed. 1966) (Madison’s recounting); *accord id.* at 206 (King’s recounting).

²⁰ JAMES WILSON, *Lectures on Law, Part II, Chapter 1: Of the Constitutions of the United States and of Pennsylvania—of the Legislative Department*, in 2 COLLECTED WORKS OF JAMES WILSON 829, 848 (Kermit L. Hall & Mark David Hall eds., 2007).

²¹ 4 ANNALS OF CONG. 930 (1794).

v. Daugherty, which arose out of the Senate’s investigation into the Teapot Dome scandal.²² Justice Willis Van Devanter, for a unanimous Court (with Justice Harlan Stone recused), held that, “[w]e are of opinion that the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function.”²³ He elaborated:

A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information—which not infrequently is true—recourse must be had to others who do possess it. Experience has taught that mere requests for such information often are unavailing, and also that information which is volunteered is not always accurate or complete; so some means of compulsion are essential to obtain what is needed Thus there is ample warrant for thinking, as we do, that the constitutional provisions which commit the legislative function to the two houses are intended to include this attribute to the end that the function may be effectively exercised.²⁴

Subsequent cases have reaffirmed this holding.²⁵

Institutionally, Congress made a significant statement about the importance of oversight in the Legislative Reorganization Act of 1946, which tasked the standing committees in both chambers with an obligation to conduct oversight:

To assist the Congress in appraising the administration of the laws and in developing such amendments or related legislation as it may deem necessary, each standing committee of the Senate and the House of Representatives shall exercise continuous watchfulness of the execution by the administrative agencies concerned of any laws, the subject matter of which is within the jurisdiction of such committee²⁶

²² 273 U.S. 135 (1927).

²³ *Id.* at 174.

²⁴ *Id.* at 175.

²⁵ *See, e.g.,* *Watkins v. United States*, 354 U.S. 178, 187 (1957) (“The power of the Congress to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes. It includes surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them. It comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste.”); *Eastland v. U.S. Servicemen’s Fund*, 421 U.S. 491, 504 (1975) (“This Court has often noted that the power to investigate is inherent in the power to make laws Issuance of subpoenas such as the one in question here has long been held to be a legitimate use by Congress of its power to investigate.”); *Trump v. Mazars*, 140 S. Ct. 2019, 2031 (2020) (quoting *McGrain* and *Watkins* to similar effect).

²⁶ Legislative Reorganization Act of 1946, § 136, Pub. L. No. 79-601, 60 Stat. 812, 832. On the 1946 Act generally, see CHAFETZ, CONGRESS’S CONSTITUTION, *supra* note 12, at 292-95; ERIC SCHICKLER, DISJOINTED PLURALISM: INSTITUTIONAL INNOVATION AND THE DEVELOPMENT OF THE U.S. CONGRESS 140-50 (2001); Roger H. Davidson, *The Legislative Reorganization Act of 1946*, 15 LEGIS. STUD. Q. 357 (1990).

The Legislative Reorganization Act of 1970 reaffirmed this oversight obligation.²⁷ Equally importantly, in these acts and others, Congress began building out its own oversight capacity by regularizing and professionalizing both committee and member staffing;²⁸ directing increased staff and resources to nonpartisan institutions, including the Legislative Reference Service (renamed the Congressional Research Service in the 1970 Act), the Offices of Legislative Counsel, and the General Accounting Office (later renamed the Government Accountability Office);²⁹ and requiring that committees issue biennial oversight reports³⁰ and ensure that, to the greatest extent possible, programs within their jurisdictions were subject to annual appropriations.³¹ Moreover, myriad other statutes contain provisions meant to encourage or facilitate oversight, ranging from protections for whistleblowers,³² to the creation of the Congressional Budget Office,³³ to requiring departments and agencies to have inspectors general and chief financial officers.³⁴

In 1927, the House created a unified Committee on Expenditures in the Executive Department, to replace the eleven committees that previously had jurisdiction to oversee executive expenditures in various departments; in 1952, the committee's name was changed to the Committee on Government Operations—the precursor of today's Committee on Oversight and Reform—in order to emphasize its broader oversight remit.³⁵ In 1948, the Senate likewise transformed its Special Committee to Investigate the National Defense Program (popularly known as the Truman Committee, due to then-Senator Harry S. Truman's chairmanship from 1941-1945) into its Permanent Subcommittee on Investigations.³⁶ Both of these committees are tasked by their

²⁷ Legislative Reorganization Act of 1970, § 118, Pub. L. No. 91-510, 84 Stat. 1140, 1156 (requiring each standing committee to “review and study, on a continuing basis, the application, administration, and execution of those laws, or parts of laws, the subject matter of which is within the jurisdiction of that committee”). On the 1970 Act generally, see CHAFETZ, CONGRESS'S CONSTITUTION, *supra* note 12, at 294-95; SCHICKLER, *supra* note 26, at 213-17; Walter Kravitz, *The Legislative Reorganization Act of 1970*, 15 LEGIS. STUD. Q. 375 (1990).

²⁸ See CHAFETZ, CONGRESS'S CONSTITUTION, *supra* note 12, at 292-94; Davidson, *supra* note 26, at 367-69; Kravitz, *supra* note 27, at 379, 383, 388.

²⁹ See CHAFETZ, CONGRESS'S CONSTITUTION, *supra* note 12, at 293-94. On the congressional support agencies as a suite, see Jesse M. Cross & Abbe R. Gluck, *The Congressional Bureaucracy*, 168 U. PA. L. REV. 1541 (2020).

³⁰ Legislative Reorganization Act of 1970, § 118, 84 Stat. at 1156.

³¹ *Id.* § 253(a)-(b), 84 Stat. at 1174-75. On the ways in which annual appropriations facilitate congressional control over the executive, see CHAFETZ, CONGRESS'S CONSTITUTION, *supra* note 12, at 61-66.

³² E.g., Lloyd-La Follette Act, ch. 389, § 6, 37 Stat. 539, 555 (1912); Civil Service Reform Act of 1978, Pub. L. No. 95-454, § 101(a), 92 Stat. 1111, 1116-17; Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 103 Stat. 16; Intelligence Community Whistleblower Protection Act of 1998, Pub. L. No. 105-272, §§ 701-02, 112 Stat. 2396, 2413-17.

³³ Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, tit. II, 88 Stat. 297, 302-05.

³⁴ Inspector General Act of 1978, Pub. L. No. 95-452, § 5(b), 92 Stat. 1101, 1103; Chief Financial Officers Act of 1990, Pub. L. No. 101-576, § 102(b)(3), 104 Stat. 2838, 2839; *id.* § 202, 104 Stat. at 2840; *id.* § 205, 104 Stat. at 2844; *id.* § 301, 104 Stat. at 2847-48; *id.* § 303(e), 104 Stat. at 2852.

³⁵ See *Guide to House Records, Chapter 11: Records of the Government Operations Committee and Its Predecessors*, NAT'L ARCHIVES & RECORDS ADMIN, CTR. FOR LEGIS. ARCHIVES, <https://www.archives.gov/legislative/guide/house/chapter-11.html> (last visited Oct. 31, 2021).

³⁶ See *Historical Background*, PERMANENT SUBCOMM. ON INVESTIGATIONS 1, <https://www.hsgac.senate.gov/imo/media/doc/PSIHistoricalBackgroundto115th.pdf> (last visited Oct. 31, 2021).

chambers with roving oversight jurisdiction,³⁷ further strengthening the chambers' commitments to vigorous and effective oversight.

INFORMATION DISPUTES BETWEEN CONGRESS AND THE EXECUTIVE

In service of this robust congressional authority to conduct oversight, discussed above, the chambers have developed a number of tools.³⁸ But it has become increasingly apparent across the first three presidencies of the twenty-first century that those tools, as the chambers have chosen to use them, have left a significant hole in Congress's oversight capacity. In particular, one question has arisen with increasing urgency: how can Congress force information from an executive branch that is unwilling to provide it? Any satisfying answer to this question must be sensitive not only to whether the information demanded is *eventually* provided to the chamber demanding it, but also to whether it is ultimately provided on a *timeframe* that is useful to that chamber.

In 2007, the House Judiciary Committee issued subpoenas to former White House Counsel Harriet Miers and then-White House Chief of Staff Joshua Bolten, in connection with the committee's inquiry into the firing of a number of U.S. Attorneys. After they refused to comply, the House voted to hold them in contempt in 2008; the Department of Justice refused to prosecute them;³⁹ and the committee sued, seeking injunctive and declaratory relief. Although the committee "won" before the district court,⁴⁰ the case was ultimately settled while on appeal in March 2009—a month and a half into the next Congress and the next presidential administration.⁴¹ The ultimate resolution clearly did nothing to help Congress oversee the George W. Bush Administration.

In 2011, the House Oversight Committee subpoenaed a number of documents from the Department of Justice in connection with its investigation into the Bureau of Alcohol, Tobacco, Firearms and Explosives's "gunwalking" operation codenamed "Operation Fast and Furious." When DOJ turned over less than the committee thought it was entitled to, the House held Attorney General Eric Holder in contempt in 2012. Once again, DOJ refused to prosecute; once again the committee sued. It was not until 2016 that a trial judge ordered that most of the

³⁷ RULES OF THE HOUSE OF REPRESENTATIVES, 117TH CONG., R. X(4)(c)(1)-(2) (2021); STANDING RULES OF THE SENATE, S. DOC. NO. 113-18, R. XXV(1)(k)(2) (2013).

³⁸ For discussions of these tools, see Chafetz, *Overspeech*, *supra* note 12, at 545-48; CHRISTOPHER M. DAVIS ET AL., CONG. RSCH. SERV., RL30240, CONGRESSIONAL OVERSIGHT MANUAL (2021); MORTON ROSENBERG, THE CONST. PROJECT, WHEN CONGRESS COMES CALLING: A STUDY ON THE PRINCIPLES, PRACTICES, AND PRAGMATICS OF LEGISLATIVE INQUIRY (2017).

³⁹ 2 U.S.C. § 194 provides that a U.S. Attorney "shall ... bring" a contempt of Congress citation certified by a chamber's presiding officer "before the grand jury for its action." Despite the seemingly mandatory language, the Department of Justice concluded that Miers and Bolten had properly invoked executive privilege; therefore "non-compliance ... with the Judiciary Committee subpoenas did not constitute a crime, and therefore the Department will not bring the congressional contempt citations before a grand jury or take any other action to prosecute Mr. Bolten or Ms. Miers." Letter from Att'y Gen. Michael B. Mukasey to Speaker Nancy Pelosi (Feb. 29, 2008), *available at* <https://www.documentcloud.org/documents/373620-mukasey-letter-to-pelosi-feb-29-2008.html>.

⁴⁰ Comm. on the Judiciary v. Miers, 558 F. Supp. 2d 53 (D.D.C. 2008).

⁴¹ See CHAFETZ, CONGRESS'S CONSTITUTION, *supra* note 12, at 185-88 (describing the lifecycle of the controversy).

documents had to be turned over (Holder had stepped down as Attorney General the previous year); fights over some of the remaining records stretched into the Trump Administration.⁴²

While oversight conflicts between the House and the George W. Bush and Obama Administrations focused on particular, discrete issues, the Trump Administration engaged in more systematic, across-the-board stymieing of congressional oversight.⁴³ Even in situations where clear statutory text seemed to impose a duty to comply with congressional information demands, the administration refused. Consider the “rule of seven,” which provides that any seven members of the House Oversight Committee or any five members of the Senate Committee on Homeland Security and Governmental Affairs can request information from any executive agency, which “shall submit any information requested of it relating to any matter within the jurisdiction of the committee.”⁴⁴ In June 2017, eighteen members of the House Oversight Committee demanded that the General Services Administration turn over details of the contract by which the Old Post Office Building in Washington was leased to an entity owned by Trump and his children. That demand was ignored.⁴⁵ Or consider the statutory requirement that the Treasury “shall furnish” the Ways and Means Committee with “any [tax] return or return information specified” in a written request from the committee chair.⁴⁶ The committee made such a request in 2019 for President Trump’s tax returns, and once again the demand was ignored.⁴⁷

In both of those cases, the House committees sued, and both of those cases remain tied up in litigation to this day. In the “rule of seven” case, the D.C. Circuit took until December 29, 2020—about three weeks before President Biden’s inauguration—to rule that the committee members had standing to sue,⁴⁸ but the case has yet to be taken up by the district court on remand. In the tax returns case, six months into the Biden Administration, the Department of Justice’s Office of Legal Counsel issued an opinion concluding that the Treasury “must comply” with the committee’s demand.⁴⁹ Trump moved to block the Treasury from complying, and a hearing is currently scheduled for later this month.⁵⁰ Indeed, judicial pacing and other judicial choices served to slow oversight of the Trump Administration across the board to such an extent as to render it largely impotent.⁵¹ To whatever extent information is eventually turned over, it will obviously come far too late to help with oversight of the Trump Administration.

⁴² See *id.* at 188-89 (describing the lifecycle of this controversy).

⁴³ See, e.g., Charlie Savage, *Trump Is Setting Course to Battle House Oversight*, N.Y. TIMES, Apr. 25, 2019, at A1.

⁴⁴ 5 U.S.C. § 2954.

⁴⁵ The facts are recounted in *Cummings v. Murphy*, 321 F. Supp. 3d 92, 97-99 (D.D.C. 2018).

⁴⁶ 26 U.S.C. § 6103(f)(1).

⁴⁷ See Comm. on Ways & Means v. U.S. Dep’t of the Treasury, No. 1:19-cv-01974, 2019 WL 4094563 (D.D.C. Aug. 29, 2019).

⁴⁸ *Maloney v. Murphy*, 984 F.3d 50 (D.C. Cir. 2020).

⁴⁹ Ways and Means Committee’s Request for the Former President’s Tax Returns and Related Tax Information Pursuant to 26 U.S.C. § 6103(f)(1), 45 Op. O.L.C. (slip op. at 39) (July 30, 2021), <https://www.justice.gov/olc/file/1419111/download>.

⁵⁰ See Docket, Comm. on Ways & Means v. U.S. Dep’t of the Treasury, No. 1:19-cv-01974 (D.D.C.) (entry dated Oct. 25, 2021).

⁵¹ See generally Chafetz, *Nixon/Trump*, *supra* note 8 (manuscript at Part II).

The experience of the last 15 years thus holds two important lessons for congressional oversight of the executive branch. First, and perhaps most obviously, the criminal contempt provision⁵² is almost entirely useless as against the executive branch, because the executive branch will not prosecute its own officers. (One could imagine it having some effect if a contumacious official feared that some future administration might prosecute her, but thus far that has not happened and does not appear to have shaped the thinking of any executive-branch contemnor.)

Second, mechanisms for enforcing congressional information demands that rely on the courts are fool's errands.⁵³ Even an eventual substantive “victory” in the courts will almost always come too late for purposes of overseeing the executive branch. And presidents, knowing this, will have every incentive to draw out court fights for as long as possible.

As a result, Congress is very much in need of creative thinking about nonjudicial avenues for forcing the executive branch to produce information.

APPROPRIATIONS-BASED OVERSIGHT

I would suggest that some of the most promising mechanisms for enforcing congressional information demands rely on Congress's power of the purse.⁵⁴ Because only Congress can control the disbursal of money from the Treasury,⁵⁵ and because every part of the executive needs money to function, Congress can use its power of the purse to put significant pressure on the executive to change its behavior in all sorts of ways—including in how the executive responds to congressional information demands.⁵⁶

The simplest and crudest form this might take would be purely retroactive: during an extended controversy with some part of the executive branch over access to information, a chamber could use the next appropriations cycle to put pressure on that agency by squeezing its funding, including perhaps by zeroing out the funding for a particular contumacious official. Of course, the other chamber might not agree with this approach, and the president almost certainly would not. But appropriations bills are must-pass: if the choice is between accepting a bill that funds a substantial portion of the government but also slashes the funding of some targeted agency or office in response to its stonewalling oversight demands, on the one hand, or refusing to pass or vetoing that bill, thereby creating lapses in appropriations for every program covered by that appropriations bill, on the other, simply accepting the bill with the retaliatory cuts may be the least-bad option. In this regard, the practice of annual appropriations of discretionary spending is significantly empowering to each house of Congress.⁵⁷

⁵² 2 U.S.C. §§ 192, 194.

⁵³ See generally Chafetz, *Nixon/Trump*, *supra* note 8.

⁵⁴ For a broader, historically grounded analysis of Congress's power of the purse generally, see CHAFETZ, CONGRESS'S CONSTITUTION, *supra* note 12, at 45-77.

⁵⁵ See U.S. CONST. art. I, § 9, cl. 7 (“No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . .”).

⁵⁶ These proposals draw on testimony I submitted to the House Budget Committee last year. See *Protecting Congress' Power of the Purse and the Rule of Law*, Hearing Before the H. Comm. on the Budget, 116th Cong. 11-74 (March 11, 2020), available at <https://www.govinfo.gov/app/details/CHRG-116hhrg41966/context>.

⁵⁷ See CHAFETZ, CONGRESS'S CONSTITUTION, *supra* note 12, at 61-73.

One can take this basic insight and then begin to add complexities that might make it less crude and perhaps at the margins less politically fraught. Consider, for example, a change to the standing rules of the House that would create a point of order against an appropriation to pay the salary of anyone who had been held in contempt by the House and whose contempt had not been purged. Of course, as with any point of order, it could be waived, but it would flip the presumption: vigorous use of the power of the purse to enforce information demands would simply be applying House rules, whereas paying the salary of a contumacious official would require an affirmative vote.

Consider also the use of oversight riders: as Senator Blumenthal and I have proposed,⁵⁸ certain appropriations could come with riders requiring that some official or officials provide specified information to Congress. If they fail to provide that information, it could trigger automatic cuts, either to the underlying appropriation or to the salaries of the officials who have failed to comply. And, importantly, these riders should come with explicit *non-severability clauses*, insisting that the rider and the appropriation stand or fall together. Without such a clause, if the Office of Legal Counsel decides that an appropriations rider is unconstitutional, then the executive considers itself free to spend the appropriated funds without the restrictions imposed by the rider.⁵⁹ In effect, the OLC's determination acts as a de facto line-item veto of the rider alone. A non-severability clause would significantly up the cost to the executive of making this determination: it would, in effect, say, "You can decide that this rider is unconstitutional, but in that case you lose the appropriation to which it was attached, as well." (The enforcement of such provisions would be facilitated by a requirement that OLC publish its budget and appropriations law opinions, a requirement that was included in the Congressional Power of the Purse Act introduced in the last Congress.⁶⁰)

While the above suggestions all rely on the threat of *withholding* money as a way to change executive branch behavior, I would also suggest one way Congress might *spend* money to enhance its oversight capabilities: internal capacity building. By increasing its own ability to find facts and uncover abuses, Congress can make itself both less dependent on information shared by the executive and also more aware of when the executive is withholding important information. And yet congressional capacity—as measured by the number of member and committee staff, the number of staff at nonpartisan institutions like the Congressional Budget Office, Government Accountability Office, and Congressional Research Service, staff tenure in office, and staff pay—has been in decline for decades.⁶¹ The American Political Science Association Presidential

⁵⁸ Richard Blumenthal & Josh Chafetz, *Trump is Already Trying to Get Around CARES Act Oversight*, SLATE (Apr. 16, 2020), <https://slate.com/news-and-politics/2020/04/richard-blumenthal-trump-cares-act-oversight.html>.

⁵⁹ For published examples of OLC deciding just that, see, e.g., *Unconstitutional Restrictions on Activities of the Office of Science and Technology Policy in Section 1340(a) of the Department of Defense and Full-Year Continuing Appropriations Act, 2011*, 35 Op. O.L.C., 2011 WL 4503236 (Sept. 19, 2011); *Constitutionality of Section 7054 of the Fiscal Year 2009 Foreign Appropriations Act*, 33 Op. O.L.C., 2009 WL 2810454 (June 1, 2009).

⁶⁰ Congressional Power of the Purse Act, H.R. 6628, 116th Cong., § 214 (introduced in the House Apr. 28, 2020).

⁶¹ See Josh Chafetz, *Delegation and Time ... And Staff*, REGULATORY REV. (Mar. 4, 2020), <https://www.theregreview.org/2020/03/04/chafetz-delegation-time-staff/>; Josh McCrain, *Congressional Staff Salaries Over Time* (May 31, 2017), <http://joshuamccrain.com/index.php/2017/05/31/congressional-staff-salaries-over-time/>; R. ERIC PETERSON & SARAH J. ECKMAN, CONG. RESEARCH SERV., R44682, STAFF TENURE IN SELECTED POSITIONS IN HOUSE MEMBER OFFICES, 2006-2016 (2016); R. ERIC PETERSON & SARAH J. ECKMAN, CONG.

Task Force on Congressional Reform recommended significant increases in capacity across the board,⁶² as has this Committee. The FY2022 Legislative Branch Appropriations bill, passed by the House in July,⁶³ would make significant strides in this direction,⁶⁴ but more can still be done, and whatever is done to increase capacity will redound significantly to Congress's benefit overall, and in conducting oversight in particular.

CONCLUSION

Oversight is an absolutely crucial function of Congress in our constitutional order. And to conduct oversight effectively, Congress needs to be able to force information from an executive branch that is at times reluctant to provide it, as the growing conflicts over information between congressional houses and the executive in the last two decades have made increasingly clear. Congress's power of the purse provides it with levers that it can use in these conflicts, and it would be well advised to make creative use of those levers going forward, so as to maintain its proper role in our constitutional system.

Thank you.

RESEARCH SERV., R44688, CONGRESSIONAL STAFF: CRS PRODUCTS ON SIZE, PAY, AND JOB TENURE (2016); MOLLY REYNOLDS ET AL., BROOKINGS INST., VITAL STATISTICS ON CONGRESS ch. 5 (Mar. 2019), *available at* <https://www.brookings.edu/wp-content/uploads/2019/03/Chpt-5.pdf>.

⁶² APSA REPORT, *supra* note 1, at 8-16.

⁶³ Legislative Branch Appropriations Act, 2022, H.R. 4346, 117th Cong. (passed the House July 28, 2021).

⁶⁴ *See generally* H.R. Rep. No. 117-80 (2021).